88-702

Supreme Court, U.S.
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No.

in the Supreme Court of the United States

OCTOBER TERM, 1988

MARY JOYCE KNOX

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether there is an abuse of discretion in excluding, on the ground of relevancy, Federal Rule of Evidence 402, competent expert testimony that a defendant is susceptible to suggestion and highly gullible, which supported her defense that she believed another person's statement that a sealed, opaque package secreted on her person contained something other than a controlled substance.

THE PARTIES TO THE PROCEEDING BELOW

The following is a list of all parties to the proceeding in the United States Court for the Eleventh Circuit, whose judgment is sought to be reviewed herein by this Petitioner:

MARY JOYCE KNOX

UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MARY JOYCE KNOX, the petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this matter on August 29, 1988.

OPINION BELOW

The August 29, 1988 opinion of the 11th Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is unreported, and is reprinted in the separate appendix to this Petition, page A-1.

JURISDICTION

The judgment of the Court of Appeals was entered August 29, 1988.

The jurisdiction of this court is invoked pursuant to Title 28, U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, reprinted in Appendix B.

This case also involves Federal Rule of Evidence 402, reprinted in Appendix C.

STATEMENT OF CASE

Mary Joyce Knox was charged in a two count indictment with offenses alledging violations of Title 21 United States Code Section 952(a) Importation of Cocaine and Section 841(a)(1), Possession with intent to Distribute Cocaine.

On January 30, 1987, Knox was apprehended by Customs officials while returning from a one-day cruise ship trip to the Bahamas. After a body search, she was found to have three packages in her girdle. Each package was wrapped in silver duct tape, oblong in shape, and pliable. The package was opaque, such that the contents were not visible nor identifiable without opening the packages. The contents of the packages consisted of cocaine.

A customs agent stated that after arrest, Knox stated, "I know it was wrong, but I needed the money. I couldn't even pay my light bill."

Appellant Knox testified in her defense. Her testimony was that her sister's boyfriend, a Bahamian named Fritz Russell, offered to pay for her to have a much needed day's vacation if she would do him a favor. Russell, whom Knox knew to be a jeweler, showed Knox a package of gold dust and asked her to pick up additional gold in the Bahamas, to which Knox agreed.

The day before the planned trip, Russell gave Knox $400.00. From this, Knox purchased her trip ticket and cabin.

In the Bahamas, Knox was met by two men on the deck of the ship, who gave her what they called only "the stuff." The men then asked Knox if she had $1,000.00 in order to pay the Customs duties; when she replied that she did not, they told her to hide the stuff in her underwear.

Knox consistently maintained that she believed the packages she brought from the Bahamas contained gold dust. She further maintained that she never knew she was going to have to hide the package she was bringing back until she was informed that she needed $1,000.00 to pay Customs duties. She admitted that once so informed she intended to avoid paying duty on what she thought was gold dust and to lie on the Customs declaration form.

After Knox testified, her counsel attempted to present the testimony of Dr. Barry Crown, a psychologist, as an expert witness, but the government objected. Out of the presence of the jury, Knox' counsel proferred that Crown would render an expert opinion as to Knox' susceptibility to suggestion. The government maintained that Crown's testimony would be irrelevant.

The Court admitted Crown's expertise but elicited Crown's testimony soley as a proffer without the jury being present.

Crown testified that he had tested and interviewed appellant Knox for three hours. He found initially that Knox has the intellectual ability of an eleven year old child, and severely impaired ability to think things through.

Crown then testified that as a result of an automobile accident in which she had suffered a head injury, Knox is impaired by "post-concussion syndrome." Such a syndrome produces problems with mental flexibility, and in this case, with lack of left brain orientation, which affected "abstracting ability, conceptualization ability and mental flexibility." As a result, Dr. Crown concluded as follows:

> [I]t's my opinion that Mrs. Knox is very open to suggestion, highly suggestable [sic], and has a

> great deal of difficulity analyzing situations as we might except a typical individual to do.
>
> It's my opinion that this lady does not analyze situations, accepts them on their face, is anxious to please, and highly open to suggestion from anyone or people that she respects or has an interest in, and that they led her without thinking of what she was doing to do what she did.

After this proffer, the government again insisted that Knox' "susceptibility to bringing in gold dust has no bearing on her knowingly and willingly bringing in cocaine," and that Crown's proferred testimony would be irrelevent. The Court agreed and disallowed the witness, stating that Knox' susceptibility to attempt to evade Customs' duties had no bearing on "whether or not she would, in fact, have violated the law if she knew this was cocaine. . . ."

This finding of irrelevancy, and the reason behind it, shows that the Court did not comprehend the purpose for which the expert testimony was offered. Whether or not Knox would have smuggled cocaine had she known she had cocaine was not at issue. The sole issue was whether *on this occasion* Knox willfully carried a substance she knew to be cocaine. Nonetheless, defense counsel's argument that Dr. Crown's testimony would be relevant to the facts in issue was not accepted.

The jury returned guilty verdicts as to the Defendant on both counts.

The Defendant was sentenced by the District Court on June 10, 1987. Mary Joyce Knox was sentenced to five (5) years imprisonment as to each of the counts 1 and 2 to run concurrently.

The Court of Appeals for the Eleventh Circuit affirmed the conviction without opinion.

REASONS FOR GRANTING WRIT

Due to the grievous errors which occurred during the Petitioner's trial and affirmed by the Court of Appeals, the Petitioner was deprived of a just and fair trial guaranteed him by the Fifth Amendment due process clause of the United States Constitution.

1.

THE TRIAL COURT ERRED IN RULING THAT DR. CROWN'S EXPERT TESTIMONY, AS PROFERRED, WAS IRRELEVANT, AND THEREFORE ABUSED ITS DISCRETION IN EXCLUDING COMPETENT EXPERT TESTIMONY THAT A DEFENDANT IS SUSCEPTIBLE TO SUGGESTION AND HIGHLY GULLIBLE, WHICH SUPPORTED HER DEFENSE THAT SHE BELIEVED ANOTHER PERSON'S STATEMENT THAT A SEALED, OPAQUE PACKAGE SECRETED ON HER PERSON CONTAINED SOMETHING OTHER THAN A CONTROLLED SUBSTANCE.

The trial court erred in concluding that Dr. Crown's expert testimony, as proferred, was irrelevent, and therefore abused its discretion in excluding it.

The Federal Rules of Evidence provide that *all* relevance is admissible, Fed. R. Evid. 402, and it is well-established that if proferred evidence "has any probative value at all," the Rule favors admission, not exclusion. *United States v. Carranco*, 551 F.2d 1197, 1200 (10th Cir.

1977); *accord, e.g., United States v. Allison*, 474 F.2d 286, 289 (5th Cir. 1973) ("all doubt should be resolved in favor of admissibility"), *cert. denied*, 419 U.S. 851, 95 S. Ct. 91, 42 L.Ed. 2d 82 (1974). Therefore, if Dr. Crown's proferred testimony met the threshold of relevancy, it should have been admitted.

In a criminal case, relevant evidence is anything which has a tendency to make an element of the crime charged more or less probable than it would be without the evidence. *United States v. Hall,* 653 F.2d 1002, 1005 (5th Cir. Unit A 1981). In this case, both crimes charged were predicated on Knox' knowing and willful possession of *cocaine*. Had the jury believed her testimony that she thought she was transporting gold dust, her acquittal would have been mandated.

Thus, any testimony bearing on her knowledge of willfulness to carry cocaine, or lack thereof was indisputably relevant. In this regard, expert testimony is no less relevant than any other form. *See United States v. Zink*, 612 F.2d 511, 515 (10th Cir. 1980) ("expert testimony may be admitted to establish the absence of a mental state essential to a crime's commission"), and cases cited therein.

Knox attempted to corroborate, via Dr. Crown, her own testimony that when her sister's boyfriend told her she'd be carrying gold dust, she believed him without question or doubt. It cannot be questioned that she was gullible, and that a person who did not suffer from an organic personality disorder might have doubted that Fritz Russell's requested errand was lawful, and perhaps wondered if the packages could realistically contain gold dust. However, Knox was charged with specific intent crimes, not strict libility regardless of knowledge.

The jury was entitled to hear expert testimony from which it could surmise and comprehend that Knox was psycologically susceptible to persuasion by Fritz Russell that *to her* there existed no reason to suspect that his assertions were false. Whether that testimony was credibile was soley within the province of the jury, a province which was invaded by the exclusion of this relevent evidence. The lower Court appears to have confused relevance and admissibility with credibility, since the proferred testimony was clearly not so confusing as to outweigh its probative value.

In two cases, the exclusion of relevant expert testimony such as Dr. Crown's resulted in reversals. *United States v. Roark*, 753 F.2d 991 (11th Cir. 1985); *United States v. Mc Bride*, 786 F.2d 45 (2d Cir. 1986); *cf. United States v. Kepreos*, 759 F.2d 961, 964 (2d Cir.) (expert testimony regarding capacity to form intent was properly excluded when such capacity to do so rather than actual presence of intent, was not questioned), *cert. denied*, — U.S. —, 106 S.Ct. 227, 88 L.Ed 2d 227 (1985).

In *Roark*, the defendant challenged the voluntariness of her confessing, asserting that she suffered from a psychological condition known as "susceptibility to suggestion". The defendant thus sought to introduce the testimony of an expert psychologist to explain that it was possible that because of this condition, she might have created whatever story she believed the interrogators wished to hear. The Court held that it was reversible error to exclude such evidence, holding that:

> [the expert's] testimony was designed to help the trier of fact determine whether it was more or less probable that Roark was somehow forced

into making the inculpatory statement . . . [and it] was thus certainly relevant.

753 F.2d at 994.

The trial court in the case reviewed *Roark*, but read it as only applying to the voluntariness of the confession. Thus, counsel's explanations that Knox had been equally "susceptible to suggestion" when she was duped into believing the "stuff" was gold dust was not accepted.

That the application of the reasoning in *Roark* to this case is sound becomes clear when the Second Circuit's opinion in *Mc Bride* is reviewed, as it clarifies the import of *Roark* further and on more similar facts. In *Mc Bride*, the appellant's defense, as here, was "her contention that she lacked culpable knowledge of the criminal activity and that [another person] manipulated her behavior in furtherance of the crime." 786 F.2d at 50. Also as in the case at bar, the excluded expert testimony was offered to explain that the appellant was unable "to reach a conclusion from known facts." *Id.* at 51. Because the crimes charged in *Mc Bride*, as here, required specific intent, the Second Circuit concluded that it was reversible error for the trial court to have excluded evidence bearing on the appellant's assertion that she "lacked culpable knowledge and was misled by her co-defendant." *Id.* at 48.

The *Mc Bride* case is thus identical to this case with regard to the evidentiary issue presented, and the same result should occur reversal. However credible — or incredible — the trial court or, the appellate Court, might find Knox' theory of defense, Dr. Crown's testimony should have been admitted. Furthermore, its exclusion was *not* harmless error.

In *Roark*, the Court reversed upon its finding that "[a] review of testimony does not establish that [the expert's]

testimony *could not have affected* the jury's verdict." 753 F.2d at 995 (emphasis added). The jury in the case at bar might well have concluded that Knox was gullible enough, and so lacking in the ability to reason, as to believe what Fritz Russell and his Bahamian cohorts told her. It is not a crime to be dumb and manipulable, and Knox was entitled to present an expert to establish that she is both, and therefore not criminally culpable as charged.

It is axiomatic that "[t]he right to offer the testimony of witnesses... is in plain terms the right to present a defense," and a right to which is "a fundamental element of due process of law." *Washington v. Texas,* 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019, 1023 (1967). In this case, that right disappeared when the trial court disallowed the testimony of Dr. Crown, the defense expert. Having conceded the witness' qualifications as an expert, it was manifest error for the Court to conclude that his testimony was irrelevant. Any competent evidence that Knox was duped into transporting cocaine which she, in fact, believed to be gold dust, was highly relevant and constituted crucial defense proof as to the "knowingly" and "willfully" elements of the crimes of importation and possession with intent to distribute a narcotic drug.

CONCLUSION

For the reasons set forth above, it is repectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this petition was mailed to the Solicitor General Department of Justice, Washington, D.C. 20530.

DONALD L. GRAHAM

Appendix

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 87-5515

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARY JOYCE KNOX,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(August 29, 1988)

Before TJOFLAT and FAY, Circuit Judges, and SHARP,* District Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 36-1.

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* Honorable G. Kendall Sharp, U.S. District Judge for the Middle District of Florida, sitting by designation.

APPENDIX B

U.S.C. CONSTITUTION AMENDMENT FIVE

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

FEDERAL RULE OF EVIDENCE 402

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

APPENDIX D

TITLE 21, UNITED STATES CODE, § 841(a)(1).

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

APPENDIX E

TITLE 21, UNITED STATES CODE, § 952(a).

It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter.

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MARY JOYCE KNOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in excluding, as irrelevant, proffered expert testimony that petitioner was highly gullible and therefore unlikely to know that a package she received from an accomplice contained cocaine.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1-2) is reported at 858 F.2d 744 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1988. The petition for a writ of certiorari was filed on October 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1954(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of importing cocaine (Count 1) and possessing cocaine with intent to distribute it (Count 2), in violation of 21 U.S.C. 841(a)(1) and 952(a). She was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed without opinion (Pet. App. 1).

1. The pertinent facts are summarized in the government's brief in the court of appeals (Gov't C.A. Br. 2-7). Late on the evening of January 30, 1987, petitioner entered the Customs area of the Port of Miami terminal after a one-day "Sea Escape" cruise that had stopped in the Bahamas. A Customs inspector noted that petitioner gave suspicious, unresponsive answers to routine re-entry questions, that her dress and actions were unlike those of other returning passengers, and that she wore a loose skirt typical of the kind favored by drug smugglers. Although she at first refused, petitioner finally agreed to submit to a body frisk by a female inspector. The frisk revealed the presence of several pliable, taped packages located between petitioner's legs and secured by a girdle.

Petitioner displayed no change of demeanor when the packages were opened, revealing the presence of a white powder. Subsequent chemical analysis showed that the packages contained approximately one kilogram of cocaine. Petitioner admitted after her arrest that she "knew it was wrong," but that she "needed the money" because she "couldn't even pay [her] light bill."

2. Testifying in her own defense, petitioner stated that a jeweler named Fritz Russell, who was a friend of her sister, had asked her to travel on a one-day cruise to the Bahamas to pick up gold chips and bring them back. Petitioner testified that she had not intended to smuggle anything but had just planned to return with Russell's gold. While she was aboard the boat during its port call in the Bahamas, petitioner stated, two strangers gave her packages wrapped in duct tape for Russell. Because she had previously seen gold wrapped in similar packages, petitioner testified that he believed the packages given to her contained gold chips. She further testified that the men in the Bahamas told her that the duty she would be charged if she declared the gold on re-entry into this

country would be $1,000, which she did not have. Petitioner stated that the strangers then suggested that she smuggle the packages in her underwear. Prior to that time, petitioner stated, she did not know that she was going to have to bring the gold back surreptitiously.

To support her theory of defense, petitioner proffered—for the first time at trial—the testimony of Dr. Barry Crown, a psychologist. Defense counsel stated that Dr. Crown's testimony was offered to show "the level of [petitioner's] susceptibility to suggestion" (Gov't C.A. Br. 5). In a proffer made outside the presence of the jury, Dr. Crown stated, based on his interview and testing of petitioner, that petitioner functioned at the intellectual level of an eleven year old, but that she had compensated for that disability by developing other skills. Dr. Crown added that petitioner was susceptible to being led into going to the Bahamas to pick up gold.

Under questioning by the district court, Dr. Crown admitted that petitioner's state of mind did not impair her ability to do an act knowingly and voluntarily, and that she was capable of doing an act willfully, with the specific intent to do it. Dr. Crown also disclosed, contrary to petitioner's trial testimony, that petitioner had told him that she knew prior to boarding the boat for the Bahamas that she was going to smuggle gold into the United States without declaring it. In view of that testimony, the court stated that it "did [petitioner] a favor" in adducing the proffered testimony outside of the jury's presence and suggested that the defense might wish to withdraw the witness. Defense counsel nonetheless sought to introduce the expert's testimony.

3. The district court excluded the proffered testimony for two reasons. First, as a procedural matter, the court found that the midtrial proffer of Dr. Crown's testimony violated the standing discovery order that required the

pretrial production of the results of any mental examination or scientific test. Second, the court found Dr. Crown's opinion to be irrelevant because, as Dr. Crown stated, it dealt with petitioner's susceptibility to being induced to go to the Bahamas to bring back gold illegally, while the sole issue at trial was whether she knew she was carrying cocaine in her underwear. The court also found it significant that Dr. Crown stated that petitioner's mental condition would not affect her capacity to perform an act knowingly, willfully, and with specific intent.

After the court rejected Dr. Crown's testimony, defense counsel argued, for the first time, that Dr. Crown's testimony would help the jury decide whether petitioner's state of mind would permit her knowingly to import cocaine. The court disagreed and adhered to its initial ruling.

ARGUMENT

Petitioner contends that the district court erred in excluding expert psychological testimony that she was highly gullible and susceptible to suggestion. As this Court has recognized, however, a trial judge enjoys broad discretion in deciding whether to admit expert testimony. *Hamling* v. *United States,* 418 U.S. 87, 127 (1974). There was no abuse of that discretion here; the district court acted well within its discretion in excluding Dr. Crown's testimony.

As the district court noted, petitioner's midtrial proffer of Dr. Crown's testimony violated both Fed. R. Crim. P. 12.2(b) and Fed. R. Crim. P. 16(b)(1)(B), which were incorporated into the standing discovery order that applied to this case. Rule 12.2(b) requires that a defendant who "intends to introduce expert testimony relating to * * * any * * * mental condition of the defendant bearing upon the issue of [his] guilt" must notify the prosecutor and the

court in writing of his intention "within the time provided for the filing of pretrial motions." Rule 16(b)(1)(B) similarly requires the production of "any results or reports of * * * mental examinations * * * which the defendant intends to introduce * * * or which were prepared by a witness whom the defendant intends to call." Both Rules 12.2(d) and 16(d)(2) in turn provide that a trial court may exclude the testimony of an expert witness for failure to comply with the notice and production requirements contained in the rules.

In *United States* v. *Nobles,* 422 U.S. 225, 241 (1975), and more recently in *Taylor* v. *Illinois,* No. 86-5963 (Jan. 25, 1988), this Court has upheld orders excluding proffered defense testimony because of a failure to comply with comparable discovery requirements. Other courts have similarly held, in circumstances comparable to those here, that expert psychiatric or psychological testimony proffered by the defense was subject to exclusion because of the failure of defense counsel to comply with applicable notice and discovery requirements. See, *e.g., United States* v. *Buchbinder,* 796 F.2d 910, 913-916 (7th Cir. 1986) (expert testimony that the defendant was extremely depressed); *United States* v. *McLernon,* 746 F.2d 1098, 1114-1115 (6th Cir. 1984) (expert testimony pertinent to an entrapment defense); *United States* v. *Medina-Gasca,* 739 F.2d 1451, 1454 (9th Cir. 1984) (expert testimony regarding a defendant's mental "deficiencies"). Petitioner's failure to comply with the rules requiring notice and production justified the exclusion of Dr. Crown's testimony even if that testimony were otherwise admissible.

Aside from the procedural bar, the district court properly excluded the expert testimony on the subject of gullibility and susceptibility. Rule 704(b) of the Federal Rules of Evidence specifies that "[n]o expert witness testifying with respect to the mental state or condition of a

defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged * * *." Moreover, in enacting 18 U.S.C. (Supp. IV) 17(c), Congress expressly abolished any defense of "diminished capacity," *i.e.*, any defense relating to a defendant's mental condition that falls short of insanity. For that reason, it has been recognized that an expert

> may not substitute her judgment as to the defendant's state of mind by testifying that because of the defendant's personality, she would not have acted in a particular manner. Absent the suggestion of the presence of a mental disease or defect, a trial court may properly exclude psychiatric testimony which merely offers an opinion about the defendant's capacity to form the mental state required to commit the offense charged.

United States v. *Esch*, 832 F.2d 531, 535 (10th Cir. 1987) (citation omitted), cert. denied, No. 87-6280 (Feb. 29, 1988).

Petitioner did not rely on an insanity defense, and the evidence in question was not offered to prove lack of capacity to form specific intent. To the contrary, Dr. Crown testified that petitioner's mental condition did *not* impair her ability to act knowingly and willfully. In such circumstances, the courts of appeals have consistently held that evidence comparable to that proffered here should be excluded as irrelevant and misleading. See *United States* v. *Lewis*, 837 F.2d at 415, 418 (9th Cir. 1988) (expert testimony regarding the effects of the defendant's corporal punishment as a child); *United States* v. *Esch*, 832 F.2d at 534 (expert testimony that the accused had a "dependent personality"); *Brown* v. *Trigg*, 791 F.2d 598, 600-601 (7th Cir. 1986) (expert testimony that the defendant's low I.Q. indicated that he did not act "knowingly"); *United States* v. *White*, 766 F.2d 22, 24-25 (1st Cir. 1985) (expert

testimony regarding the defendant's susceptibility to mother's influence); *United States* v. *Kepreos,* 759 F.2d 961, 964 (1st Cir.), cert. denied, 474 U.S. 901 (1985) (expert testimony regarding the defendant's diminished mental state that hindered his "ability to attend to subtle details").

The decision in this case does not conflict with *United States* v. *McBride,* 786 F.2d 45 (2d Cir. 1986), or *United States* v. *Roark,* 753 F.2d 991 (11th Cir. 1985), as petitioner contends. In *McBride,* a bank larcency prosecution, the defendant sought to present psychiatric testimony to support her contention that she had not formed the requisite guilty knowledge. To that end, the defendant offered the testimony of a psychiatrist that the defendant had suffered "residual organic brain impairment" as a result of beatings inflicted by her husband and that she was "functional but [mentally] impaired" at the time of the offense (786 F.2d at 49). The district court excluded the testimony. The court of appeals reversed, holding that the expert's opinion "as to the psychological implications of [the defendant's] objectively ascertainable organic brain injury would have been of assistance to the jury" in determining the defendant's mental state in light of the "conscious avoidance" theory on which the case was submitted to the jury (*id.* at 50). In so holding, however, the court expressly recognized that "a district court may exclude psychiatric testimony which merely offers an opinion about the defendant's capacity to form the mental state required to commit the offense charged, without suggesting the presence of a mental disease or defect" (*ibid.*). Since there was no indication of "organic impairment" here, *McBride* would not require the admission of the expert testimony that was at issue in this case. See *United States* v. *Lewis,* 837 F.2d at 418 n.6; *United States* v. *Esch,* 832 F.2d at 535.

Similarly, in *Roark* the court held that a psychologist's testimony regarding the defendant's susceptibility to suggestion was erroneously excluded at trial. In *Roark*, however, the proffered testimony dealt with whether the defendant's confession was voluntary, or whether her neurosis, which effectively put her in a hypnotic state during interrogation, affected the voluntariness of her statements to law enforcement officials (753 F.2d at 994). Since the issue of voluntariness was submitted to the jury, the court found that the expert's testimony would have "help[ed] the trier of fact determine whether * * * Roark was somehow psychologically coerced into making the inculpatory statements" (*ibid.*). In reaching that result, the court did not suggest that expert testimony of the kind at issue in this case would be admissible; indeed, the court cautioned that its ruling did not even mean "that this kind of testimony is always admissible in every confession case" (*id.* at 994-995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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